STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 11, 2013
v	No. 298206 Jackson Circuit Court
VICTOR LEN CRUMP, Defendant-Appellant.	LC No. 09-006101-FH

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Defendant raises several challenges to his convictions, sentences, and habitual offender sentence enhancement based in part on his status as a hearing-impaired individual and also on the deficient performance of trial counsel. Although defendant's trial and sentencing were less than perfect, we detect no reversible errors. While we remand to the trial court to allow the ministerial correction of defendant's presentence investigation report (PSIR), we otherwise affirm.

I. BACKGROUND

Defendant was prosecuted for physically attacking his estranged girlfriend, Michelle Grubbs, inside the home where she worked as a caregiver for an elderly man. On the morning of October 5, 2009, defendant's daughter called the home and asked if Grubbs was present. Tony Kenari,[1] the elderly man's nephew, answered the phone and lied on Grubbs' behalf, stating that she was not there. Defendant almost immediately appeared at the front door, knocking and threatening Grubbs. Defendant then slipped a letter under the door and laid in wait until he saw someone collect it. Defendant again shouted threats at Grubbs. Kenari left and the elderly man's son, James Johnson, arrived. Johnson remained in the home for six hours. Defendant telephoned and Johnson also lied about Grubbs' presence.

Immediately after Johnson left the house between 4:30 and 5:00 p.m., defendant reappeared at the front door, this time with his two young grandchildren in tow. Defendant

[1] "Kenari" is spelled inconsistently throughout the lower court record.

banged on the front door and yelled at Grubbs. Grubbs contacted 911 and hung up just as defendant broke through the home's back door. Grubbs fled to the basement to hide but defendant tracked her down. Defendant beat Grubbs severely using his fists and the door handle he pulled off the back door.

Police arrived while defendant was still on the scene. Only defendant, Grubbs, and her elderly charge were inside the home. The officers discovered Grubbs, whose face was swollen and bloody, on the basement stairs. Defendant was still in the basement and was holding a bloody white rag. Defendant spontaneously told the officers that he beat Grubbs because she owed him money. Grubbs informed the officers that defendant was hard of hearing. Accordingly, the officers spoke loudly when instructing him and showed him a written copy of his *Miranda* rights.[2]

After a trial in which defendant was assisted by an "oral transliteration" interpreter, a jury convicted defendant as charged of first-degree home invasion, MCL 750.110a(2), assault with intent to commit great bodily harm less than murder, MCL 750.84, and aggravated domestic violence, MCL 750.81a(2). The court sentenced defendant as a fourth habitual offender.[3]

Following defendant's trial and sentencing, the circuit court conducted a series of hearings spanning from January through November 2011. The hearings were dedicated to determining the nature and extent of defendant's hearing impairment and his ability to understand the proceedings against him, as well as the competency of the representation he received at trial. Through these hearings, the court ascertained that defendant began to lose his hearing at the age of five. He had learned to read lips and also communicated through gestures. Defendant has a limited education but was able to communicate by writing as well. Defendant lacked training in American Sign Language. However, defendant was not completely deaf and with the use of hearing aids could understand verbal communication if spoken loudly enough.

II. ASSISTANCE OF COUNSEL

On appeal, defendant raises several challenges to the performance of his trial counsel, Timothy Williams. Defendant filed a motion for a new trial or a *Ginther* hearing[4] and, as noted, the circuit court conducted the requested hearing over a period of 11 months. At the hearings, defendant raised only some of his ineffective assistance claims. Our review of those issues is fully preserved. We must review the remaining issues for plain error evident on the existing record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] Defendant asserts on appeal that "[t]here is some question" whether the court sentenced him as a third or fourth habitual offender. Defendant's sentencing information report, however, indicates that the sentencing guideline minimum range was selected based on defendant's status as a "4th or subsequent" habitual offender. There is no question on the record that defendant's sentence was enhanced as a fourth habitual offender.

[4] *People v Ginther*, 390 Mich 436, 440; 212 NW2d 922 (1973).

Whether a defendant has received the effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "[T]he right to counsel is the right to the effective assistance of counsel'" *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984) (quotation marks and citation omitted). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's ineffective assistance claim includes two components: the defendant must establish that counsel's performance was deficient and that the deficient performance was prejudicial to the defense. Counsel's performance is deficient if it falls below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel's deficient performance is prejudicial if there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 663-664. The defendant must overcome the strong presumptions that counsel's conduct was reasonable and amounted to sound trial strategy. *Strickland*, 466 US at 689.

A. FAILURE TO MOVE FOR SUPPRESSION OF POLICE STATEMENT

Defendant asserts that Williams should have sought suppression of the statement he made to police after an officer read his *Miranda* rights and he had been placed in the back seat of a police cruiser. Suppression, he argues, is supported by MCL 393.505 of the Deaf Persons' Interpreters Act, MCL 393.501 *et seq*. (DPIA). MCL 393.505 provides:

> (1) If a deaf or deaf-blind person *is arrested and taken into custody* for any alleged violation of a criminal law of this state, the arresting officer and the arresting officer's supervisor *shall procure a qualified interpreter* in order to properly interrogate the deaf or deaf-blind person and to interpret the deaf or deaf-blind person's statements.
>
> (2) A statement taken from a deaf or deaf-blind person before a qualified interpreter is present *is not admissible in court*. [Emphasis added.]

A "deaf person" is defined by MCL 393.502(b) as "a person whose hearing is totally impaired or whose hearing, with or without amplification, is so seriously impaired that the primary means of receiving spoken language is through other sensory input; including, but not limited to, lip reading, sign language, finger spelling, or reading."

Despite knowing that defendant was hearing impaired, an officer proceeded to question him while in the rear of the patrol vehicle. Defendant told the officer that he could read lips and indicated that he understood "everything" the officer was saying. Defendant told the officer that Grubbs owed him $40 and he could not leave Jackson and return to his home in Detroit without that money. Defendant also told the officer that he called Grubbs and heard another man's voice in the background so he went to her work "to find out what was going on." Defendant claimed that he and Grubbs were engaged in mutual combat, using their fists to punch each other. He also admitted that "he was the man so he was stronger and . . . that's why [Grubbs'] injuries were worse than his." This evidence was presented through the testimony of Jackson police officer Scott Goings with no objection from defense counsel.

Had counsel objected before trial to the admission of defendant's statements to Officer Goings, the court would have been required to conduct a pretrial hearing to determine if defendant was in fact deaf as defined by the act and whether he "lacked the necessary communication skills to make a statement without the aid of an interpreter." *People v Brannon*, 194 Mich App 121, 128; 486 NW2d 83 (1992). If the circuit court had determined that defendant was "deaf" after the hearing, defendant's statements made without an interpreter would have been inadmissible as a matter of law. *Id.* at 129, citing MCL 393.505(2). Even if the circuit court determined that defendant was not "deaf" as defined in the statute, but was merely "hearing impaired," the court would have had to consider whether "defendant was able to comprehend his rights and make a knowing and intelligent waiver of his rights." *Id.* at 130.

Counsel's performance fell below objective standards of reasonableness. At the *Ginther* hearing, counsel admitted that he had not read the DPIA and had no idea, even by the time of the hearing, that defendant's statement made to the police without the presence of an interpreter could be inadmissible. Given the information presented at the post-trial hearing, defendant was deaf and his patrol car statements would have been automatically excluded. The statements were prejudicial because defendant directly inculpated himself in the offense.

Nonetheless, the circuit court did not err in determining after the post-trial hearing that this error did not require a new trial. The remainder of the evidence placed before the jury was sufficient for the jury to assess defendant's guilt of the charged offenses. The jury heard testimony that defendant spontaneously and before being read his rights told Jackson police officer Holly Rose that he beat up Grubbs. Grubbs identified defendant as her assailant. When police arrived at the scene, defendant was the only individual in the home capable of inflicting such serious injuries on Grubbs. Moreover, the officers found defendant alone with Grubbs in the basement, which was covered in blood splatter, and he was wiping his hands on a bloody rag. Based on this evidence, there is no reasonable probability that, had defendant's challenged statement been suppressed, defendant would have been acquitted.[5]

B. CROSS-EXAMINATION OF THE VICTIM

Defendant also challenges Williams' cross-examination of Grubbs. Defendant argues that Williams should have elicited testimony that Kenari "was angry with her" to establish Kenari's motive to assault Grubbs, and that Grubbs ejected Kenari from the home "just before [defendant] allegedly beat her up" to establish his presence within the time frame of the crime.

[5] We note that defendant has not challenged Williams' decision to prepare for trial without the aid of an interpreter to communicate with defendant. Williams explained that he did not think he was statutorily entitled to such assistance. MCL 393.503(1), however, provides that "the court shall appoint a qualified interpreter . . . to assist in preparation of the action with the deaf . . . person's counsel."

Defendant also does not challenge the fairness of his trial proceedings despite that he had the assistance of only one interpreter and yet required three to four interpreters at a time to participate in the post-trial hearing.

The cross-examination of witnesses is presumed to be a matter of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Williams did in fact elicit testimony from Grubbs that Kenari was angry at her for enforcing the house rules of her employer. There is no record support, however, for the proposition that Kenari was at the house "just before" the assault. According to Grubbs and Johnson, Kenari left the home at approximately 9:30 a.m. and did not return before the assault, which occurred sometime between 4:30 and 5:00 p.m. We find no error in this regard.

C. FAILURE TO INVESTIGATE AND PRESENT WITNESSES

Defendant argues that Williams should have investigated Deborah Davenport as a potential witness and should have presented her testimony at trial. Davenport, Grubbs' cousin, apparently told Officer Goings that Grubbs admitted to her that defendant was not guilty and that Kenari, the nephew of Grubbs' elderly patient and Grubbs' on-again-off-again boyfriend, assaulted her. "Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). The failure to call a witness only constitutes ineffective assistance if it deprived the defendant of such a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *Chapo*, 283 Mich App at 371 (quotation marks and citation omitted).

Williams testified at the *Ginther* hearing that he spoke to Davenport over the telephone, thereby investigating her as a potential witness. Counsel could not "recall that she had any specific information or take on what [Kenari's] involvement was with" Grubbs' attack. Counsel therefore apparently dismissed Davenport's tale, just as Officer Goings had during the criminal investigation. Defendant did not call Davenport as a witness at the *Ginther* hearing, and we have no way to know whether Davenport would have repeated what she told Officer Goings or otherwise provided credible testimony. Consequently, defendant failed to establish the factual predicate of his claim that Williams was ineffective for failing to call Davenport as a witness. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (holding that a defendant must establish the factual predicate of his ineffective assistance claim); *People v Armstrong*, 124 Mich App 766, 771; 335 NW2d 687 (1983) ("Witnesses who might have been called at trial should have been produced and their testimony made part of the evidentiary hearing record."). Absent Davenport's testimony at the post-trial hearing, we cannot definitively conclude that her absence at trial denied defendant a substantial defense or affected the outcome of the proceedings.[6]

D. FORGOTTEN DEFENSE THEORY

Defendant also claims that trial counsel was ineffective when he concocted, right before closing argument, the defense theory that Grubbs should not be believed and abandoned his theory posited in opening statement "that in fact there was another man there. Another man who

[6] At the post-trial hearing, defendant also challenged counsel's failure to present Kenari and defendant's grandchildren as defense witnesses. Defendant has not renewed those challenges on appeal.

was the one who let him in the house, another man who was the one who told him where the [victim] was." Through this statement, counsel alluded to his planned strategy of proving that Kenari was also in the home when defendant entered and that Kenari had actually attacked Grubbs.

The "decision concerning what evidence to highlight during closing argument" is presumed to be a matter of trial strategy. *Horn*, 279 Mich App at 39. Contrary to defendant's appellate challenge, Williams did not abandon the theory that Kenari could have committed the assault. During closing, Williams argued, "We don't know who else was there. Mr. James Johnson, Jr., admitted 'Yeah, it's possible that Tony [Kenari] could've come back during that time period.'" Williams continued, "Someone else could've been there . . . . No one was interested in looking for any other alternative theories." Williams thereby emphasized that the police failed to investigate Kenari's possible involvement. Unfortunately for defendant, there was little evidence to support this theory and not much for counsel to say in this regard.

E. FAILURE TO ALLOCUTE AT SENTENCING

Defendant further argues that Williams was ineffective for failing to make any meaningful allocution at sentencing. This argument is strange because on the eve of sentencing, defendant hired appellate counsel, Cornelius Pitts, and refused to speak with Williams on the morning of the sentencing hearing. Pitts was uncooperative with the court's efforts to proceed with the sentencing and refused to go forward absent a competency evaluation. Pitts would not continue even after the court definitively and finally ruled that the sentencing hearing would be held as scheduled. Williams then allocuted on defendant's behalf, despite being fired by defendant, noting defendant's sincere belief in his innocence and citing concerns for defendant's safety in the prison setting given his hearing impairment. Defendant has not identified any circumstances that Williams should have requested the trial court to consider in imposing sentence. MCR 6.425(E)(1)(c) ("At sentencing the court must, on the record" allow the parties "an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence."). Accordingly, we have no ground to find Williams' performance deficient.

Defendant also challenges Williams' failure to "discuss any of the factual or legal issues presented by the PSIR" or to object to defendant's sentence as a fourth, rather than third, habitual offender. The substance of the sentencing challenges will be discussed *infra*. Even if those claims had merit, Williams would have been ill prepared to discuss the accuracy of the PSIR and defendant's criminal history without defendant's assistance to discover potential errors. We will not fault Williams' performance when defendant refused to cooperate.

F. CUMULATIVE ERROR

Finally, defendant argues that the cumulative effect of the deficiencies in Williams' performance requires reversal of his convictions. However, because defendant has only established one error in trial counsel's performance—the failure to move to suppress defendant's statement to police under MCL 393.505—"there are no errors that can be aggregated to form a cumulative effect." *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008).

III. SENTENCING

A. LATE PROVISION OF PSIR

The remainder of defendant's appellate challenges center on his sentencing. Defendant first contends that the trial court violated MCR 6.425(B) by proceeding to sentence defendant despite that neither of his attorneys received a copy of the PSIR in advance. Defendant did not raise this challenge below and it is therefore unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). We review unpreserved claims for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

At the time of defendant's sentencing, MCR 6.425(B) stated, in relevant part: "The court must provide copies of the presentence report to the prosecutor, and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time *before the day of sentencing*." (Emphasis added.)[7] Regardless what constituted "a reasonable time," the plain language of MCR 6.425(B) required that a copy of the PSIR be provided to the defendant's attorney "before the day of sentencing."

Defendant asserts that neither Williams nor Pitts received a copy of his PSIR before the date of sentencing. Accepting that argument as true, the error would not require resentencing. MCR 6.425 has not required resentencing in the face of a violation since 1989. *People v Petit*, 466 Mich 624, 632-633; 648 NW2d 193 (2002). In *Petit*, the Supreme Court noted that MCR 6.425 no longer states that a failure to comply shall require resentencing. *Id.* at 632. Rather, we must abide by MCR 2.613(A), which states that "an error or defect in anything done or omitted by the court . . . is not a ground . . . for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." Defendant cites no objections to the PSIR or to the sentencing guidelines that his attorneys could have raised that would have resulted in a different sentence. Defendant is therefore not entitled to relief.

B. ATTORNEY-CLIENT DISCUSSION OF PSIR

Defendant argues that the trial court violated MCR 6.425(E)(1)(a), which provides that "the court must, on the record . . . determine that the defendant, the defendant's lawyer and the prosecutor have had an opportunity to read and discuss the presentence report." On the morning of sentencing, defendant refused to discuss his PSIR with Williams. The court allowed defendant an opportunity to discuss the PSIR with Pitts. After a brief meeting with defendant using the services of an interpreter, Pitts declared that defendant was incompetent to discuss the matter or to be sentenced. Pitts rejected the court's offer to adjourn the sentencing until the end

[7] The court rule has since been amended and now requires provision of the PSIR at least two days before the sentencing hearing.

of the day even though the court ruled that it would not delay sentencing pending a competency evaluation.[8]

"[E]rror requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). Under the circumstances, defendant is precluded from relief. The court gave him an opportunity to meet with his attorney; defendant and his attorney simply refused to cooperate and abide by the court's rulings. Because the trial court gave defendant opportunities to discuss the PSIR with Pitts, defendant cannot now claim a violation of MCR 6.425(E)(1)(a).[9]

C. ERRORS IN PSIR

Defendant challenges the trial court's conclusion that he was on probation for a prior offense at the time he committed the current offenses. The prosecution concedes that defendant was not actually on probation at the time and that the court erred in this regard. As accurately noted by the prosecution, only the scoring of prior record variable (PRV) 6 was affected by this error. The court scored five points for PRV 6 based on its ruling. See MCL 777.56(1)(d). The reduction of five points from defendant's total PRV score does not affect the sentencing grid in which he was placed. The sentencing offense was first-degree home invasion, which is a class B crime. MCL 777.16f. For class B crimes, a PRV score of 50 to 74 points is PRV level E. MCL 777.63. Thus, when five points are subtracted from defendant's PRV score of 60 points, there is no change in the guidelines range. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). We remand, however, for the ministerial correction of defendant's PSIR to eliminate any reference to his probationary status at the time the current offenses were committed. MCR 6.435(A); MCR 7.216(A)(4).

D. THE PROSECUTOR DID NOT CONCEDE TO THIRD HABITUAL OFFENSE ENHANCEMENT

We also reject defendant's argument that, because the trial prosecutor told the court that defendant only had two prior felony convictions, the prosecution should be held to that position on appeal. At sentencing, the prosecutor noted that the PSIR stated that defendant had three prior felony convictions but that he only "counted" two prior felony convictions.

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[8] We note that defendant has since abandoned his claim of incompetency.

[9] Even if defendant established a violation of MCR 6.425(E)(1)(a), the violation would not entitle defendant to be resentenced. Defendant makes no argument that, had he received an additional opportunity to speak with his lawyer, the lawyer would have raised any objections to the PSIR or to the sentencing guidelines that would have resulted in a different sentence. Accordingly, defendant has not shown that refusal to vacate his sentences and remand for resentencing would be inconsistent with substantial justice. MCR 2.613(A).

A party may not take a different position on appeal than it took before the trial court. See *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). But the prosecution is not taking inconsistent positions here. MCL 769.12(1) permits convictions to be counted as prior offenses when enhancing a habitual offender's sentence if they are "felonies *or attempts* to commit felonies." (Emphasis added.) In 1997, defendant had been convicted of two prior felonious acts of criminal sexual conduct (CSC). In 2008, defendant was also convicted of an attempt to commit a felony—assaulting, resisting, or obstructing a police officer. The prosecution did not challenge the accuracy of that attempted felony conviction in the trial court and is not precluded from relying upon that conviction to support the sentence enhancement. See *People v Slocum*, 156 Mich App 198, 200; 401 NW2d 271 (1986); *People v Davis*, 89 Mich App 588, 594; 280 NW2d 604 (1979).

E. EX POST FACTO VIOLATION

In 1997, defendant was convicted of two separate CSC offenses arising out of a single incident. In 1997, convictions arising out of a single incident were treated as one offense for the purpose of enhancing a defendant's sentence as a habitual offender. *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990). In 2008, however, our Supreme Court overruled *Preuss* and held that the plain language of the habitual offender statutes "directs courts to count each separate felony conviction that preceded the sentencing offense, not the number of criminal incidents resulting in felony convictions." *People v Gardner*, 482 Mich 41, 44; 753 NW2d 78 (2008). Defendant claims that the trial court's decision to follow *Gardner*, rather than *Preuss*, amounted to an Ex Post Facto law. Because defendant did not raise this issue before the trial court, the claim of error is unpreserved, *Metamora Water Serv, Inc*, 276 Mich App at 382, and our review is limited to plain error affecting defendant's substantial rights, *Carines*, 460 Mich at 763.

Ex post facto laws are prohibited by the United States Constitution, US Const, art 1, § 10, and the Michigan Constitution, Const 1963, art 1, § 10. *People v Callon*, 256 Mich App 312, 316-317; 662 NW2d 501 (2003). "A statute that affects the prosecution or disposition of criminal cases involving crimes committed before its effective date violates the Ex Post Facto Clauses if it . . . increases the punishment . . . ." *People v McRunels*, 237 Mich App 168, 175; 603 NW2d 95 (1999) (quotation marks and citation omitted). Although the Ex Post Facto Clauses do not apply directly to the judiciary, ex post facto principles apply to the judiciary through the Due Process Clauses. *People v Doyle*, 451 Mich 93, 99-100; 545 NW2d 627 (1996).

In *Callon*, 256 Mich App at 320, this Court noted that ex post facto challenges to habitual offender statutes have been rejected, citing in part *People v Palm*, 245 Mich 396; 223 NW 67 (1929). In *Palm*, 245 Mich at 402-403, the Supreme Court stated:

> In Cooley on Constitutional Limitations (8th Ed.) p. 553, it is said: "And the law is not objectionable as ex post facto which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into the account, and the punishment to [be] graduated accordingly. Heavier penalties are often provided by law for a second or any subsequent offense than for the first; and it has not been deemed objectionable that, in providing for such heavier penalties, the prior conviction authorized to be taken into the account may have

> taken place before the law was passed. In such case, it is the second or subsequent offense that is punished, not the first."

We reject defendant's claim that application of *Gardner* to treat his 1997 CSC convictions as separate offenses results in an ex post facto law. The application of *Gardner* does not increase punishment for crimes committed before it was decided by the Supreme Court. The habitual offender statutes, and *Gardner*'s interpretation of them, do not impose punishment for defendant's CSC convictions. Rather, defendant's CSC convictions were only used to enhance the penalties of the 2009 crimes for which defendant was being sentenced. *Palm*, 245 Mich at 403; see also *Gardner*, 482 Mich at 47 ("Habitual offender status may increase a defendant's minimum and maximum sentences."). Accordingly, each of defendant's 1997 CSC convictions counts as a separate offense for the habitual offender statutes and, including the 2008 attempted resisting or obstructing an officer conviction, defendant had three convictions that served as predicate felonies or attempted felonies for the habitual offender enhancement.

F. REFERENCE TO HABITUAL OFFENSE ENHANCEMENT IN PSIR AND JUDGMENT OF SENTENCE

Defendant argues that the PSIR and the judgment of sentence must be corrected to remove any reference that he was convicted as a fourth habitual offender. Defendant relies on the rule that the "habitual offender statutes are merely sentence enhancement mechanisms" and do not create separate substantive offenses. *People v Zinn*, 217 Mich App 340, 345; 551 NW2d 704 (1996). Neither the PSIR nor the judgment of sentence lists defendant's status as a fourth habitual offender as a separate offense. The references to defendant's habitual offender status appear immediately after citation of the substantive offenses for which defendant was convicted. Defendant fails to provide any persuasive argument that this is an improper method to indicate that defendant's sentences will be or have been enhanced because of defendant's habitual offender status. Accordingly, we decline defendant's request to remand for removal of the "4th Habitual" and "4th Felony" references in the PSIR and the judgment of sentence.

G. HABITUAL STATUS BASED ON CONVICTIONS SECURED WITHOUT AN INTERPRETER

Defendant further argues that, because he did not have the assistance of a qualified interpreter when he was convicted of two CSC counts in 1997 and attempted resisting an officer in 2008, those prior convictions cannot be used under the habitual offender statutes to enhance his sentences. He claims that the use of his prior convictions to enhance his sentences is a violation of due process. We review de novo questions of constitutional law. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009).

Had defendant been deprived of *counsel* during his prior trials, he may have merited sentencing relief in the current case. A defendant's prior conviction obtained in violation of his right to counsel may not be used to enhance the defendant's punishment for another offense. *People v Moore*, 391 Mich 426, 436-438; 216 NW2d 770 (1974). A defendant may collaterally attack a prior conviction on the basis that it was obtained in violation of his right to counsel. *People v Carpentier*, 446 Mich 19, 29-30; 521 NW2d 195 (1994). The defendant "bears the initial burden of establishing that the conviction was obtained without counsel or without a

proper waiver of counsel." *Id.* at 31. The defendant must present documentary evidence supporting that counsel was absent. *Id.* "Mere silence regarding counsel [in a defendant's PSIR] is not the equivalent of the prima facie proof required" by Michigan precedent. *Zinn*, 217 Mich App at 344. There is no Michigan case law extending this principle to convictions obtained without the assistance of an interpreter.

Defendant relies on *New York v Rivera*, 125 Misc 2d 516; 480 NYS2d 426 (1984), where a foreign trial court held that the prior convictions of the hearing-impaired defendant could not be used to enhance the defendant's sentences because the convictions were obtained without the defendant having a qualified interpreter. Even if we were persuaded by *Rivera* to extend a defendant's right to collaterally attack prior convictions, defendant has not met his burden of proof. We have only defendant's word that his prior convictions were secured without the aid of an interpreter. Defendant's PSIR is silent on this point and defendant has provided no records from the prior cases from which we could ascertain whether defendant had or was offered the aid of an interpreter. Accordingly, we find no ground to grant defendant relief.

Affirmed, but remanded for the ministerial correction of defendant's PSIR consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens